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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL LAZCANO CORREA,

Defendant and Appellant.

D072971

(Super. Ct. No. SCN365348)

APPEAL from a judgment of the Superior Court of San Diego County, Robert P. Dahlquist and Michael K. Kirkman, Judges. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Rafael Correa guilty of transportation of a controlled substance (cocaine) for sale, and found true the allegation that the quantity of cocaine

exceeded 20 kilograms. The trial court imposed an 18-year split sentence. Correa contends the trial court erred by failing to adequately instruct the jury that it was required to find that he harbored the *specific intent* to transport the cocaine *for sale*. Similarly, he contends insufficient evidence supports the jury's finding he harbored such an intent. These contentions lack merit.

Correa also requests that we independently review the trial court's proceedings on his motion to discover law enforcement personnel records. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) We have done so, and find no error.

Accordingly, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

The People charged Correa with a single count of transportation of a controlled substance for sale (Health & Saf. Code,<sup>1</sup> § 11352, subd. (a)), and further alleged the quantity exceeded 20 kilograms (§ 11370.4, subd. (a)(4)).

#### *Prosecution Case*

The prosecution's only witness was Gino Rodriguez, a deputy in the Orange County Sheriff's Department. Rodriguez had been a deputy for 23 years, including 10 years assigned to the department's Highway Interdiction Team, which patrolled Interstate 5 near the San Diego County/Orange County border and intercepted bulk quantities of narcotics, currency, weapons, and ammunition.

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<sup>1</sup> Further statutory references are to the Health and Safety Code unless otherwise indicated.

While patrolling Interstate 5 on the morning of October 13, 2016, Deputy Rodriguez stopped a minivan for speeding near the Christianitos Road exit. Correa was the only occupant of the minivan, which was registered in his name. When Correa appeared "overly nervous," Rodriguez obtained his consent to search the van. Rodriguez, who teaches other law enforcement officers how to find concealed compartments in vehicles, flipped the middle-row seat forward and "noticed that the seat felt heavier than normal." He opened the plastic seatback and found "a kilogram-size package that was wrapped in silver tape that [he] suspected to be narcotics." Rodriguez arrested Correa.

Deputy Rodriguez contacted the border patrol for assistance in moving the minivan to the nearby border patrol checkpoint. Once there, Rodriguez extensively searched the minivan and found 19 more kilogram-size packages. The parties stipulated the packages contained 20.06578 kilograms (about 44 pounds) of cocaine, which Rodriguez opined would have a street value of about \$500,000.

After waiving his *Miranda*<sup>2</sup> rights, Correa told Deputy Rodriguez he knew the drugs were in the minivan and he was being paid \$2,000 to transport them from Mexico to an as-yet-unspecified destination in the Los Angeles area. Correa initially told Rodriguez this was his first time transporting drugs, but he ultimately admitted he had done so once before. Correa never mentioned that anyone had threatened him or his family to coerce him into transporting the drugs. However, he did ask Rodriguez for help and offered to complete the delivery so Rodriguez could follow him to the destination. In

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

Rodriguez's experience, drug transporters commonly make such offers in hopes of getting a lighter sentence. Rodriguez did not allow Correa to complete the delivery.

Based on his training and experience, Deputy Rodriguez opined the cocaine was being transported for purposes of sale. He based this conclusion on the packaging and quantity, adding that "20 kilos . . . isn't even a close call." Rodriguez did not believe Correa owned the drugs or knew specifically where in the minivan they had been concealed.

### *Defense Case*

Correa testified in his defense. He lived in Tijuana with his wife and teenage daughter. He worked as a shuttle driver, transporting passengers from San Ysidro to Los Angeles. His income from this job satisfied the family's financial needs.

A few weeks before his arrest, a man approached Correa in Tijuana and told him he needed to transport something across the border. When Correa declined, the man pointed to a nearby truck, where another man displayed a gun. The first man said, " 'We're not playing around. Think about it.' "

Three days later, the same man approached Correa and showed him pictures taken the day before of Correa's wife and daughter. The man threatened to kill Correa or his family if he did not cooperate. Correa did not report this to the police because he believed "80 percent of the police in Mexico [are] corrupt."

A few weeks later, the same man approached Correa, pointed to a nearby truck with armed occupants, and gave Correa \$4,500 to buy a vehicle. The man showed new photos of Correa's wife and daughter and warned, " 'If you cross us, we'll kill them.' "

The man told Correa to buy a vehicle and use it for a week to cross the border. Correa complied. The day before Correa's arrest, the man took the minivan overnight. After the man returned it, Correa drove across the border and was arrested by Deputy Rodriguez.

Correa admitted he never reported the alleged threats to law enforcement despite being in pretrial custody for eight months. Nor did he ever tell his wife she was in danger. Correa explained he did not mention the threats to Deputy Rodriguez during the arrest because he believed the traffickers were following him and his family was in Tijuana. However, he admitted he offered to lead Rodriguez—who was in uniform and in a marked patrol car—to the drop location.

Correa's wife testified as to his character for honesty and trustworthiness. However, she admitted he had not told her about his drug trafficking activities.

### *Jury Verdict and Sentencing*

After deliberating for 37 minutes, the jury found Correa guilty and found true the 20-kilogram enhancement allegation. The trial court imposed an 18-year split sentence (evenly split between custody and mandatory supervision), consisting of the low term of three years on the transportation conviction, followed by a 15-year term for the 20-kilogram enhancement. In deciding not to stay the quantity enhancement, the trial court relied in part on its (and the jury's) conclusion that Correa's necessity defense was not credible.<sup>3</sup>

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<sup>3</sup> The trial court stated: "I don't believe for a second that the defendant didn't comprehend, didn't understand just what a substantial quantity of drugs that he had in his possession. And as we know, he admitted that he had done this before. *And I didn't*

## DISCUSSION

### I. *Instructional Error*

Correa contends the trial court erred in instructing the jury regarding the elements of transportation of a controlled substance for sale because the pattern jury instruction (CALCRIM No. 2300) failed to inform the jury that it was required to find that he harbored the *specific intent* to transport the cocaine *for sale*. We conclude the jury instructions, as a whole, adequately conveyed this requirement. And even if the instructions were erroneous, any error was harmless beyond a reasonable doubt.

#### A. *Background*

The trial court instructed the jury regarding specific intent using CALCRIM No. 251, which reads:

"The crime[s] charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crime[s] in this case, that person must not only intentionally commit the prohibited act, but *must do so with a specific intent*. The act and the specific intent required are explained in the instruction for that crime." (Italics added.)

The trial court then instructed the jury regarding the elements of transportation for sale using CALCRIM No. 2300, which states in part:

"The defendant is charged in Count 1 with transporting for sale cocaine, a controlled substance[,] in violation of Health and Safety Code Section 11352(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that:

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*believe his account with regard to what prompted all of this. I knew he was a willing participant. The jurors agree. And in the end, he must be held accountable for what he did.*" (Italics added.)

- "1. The defendant *transported for sale* a controlled substance;
- "2. The defendant knew of its presence;
- "3. The defendant knew of the substance's nature or character as a controlled substance;
- "4A. The controlled substance was cocaine; [¶] . . . [¶] AND
- "5. The controlled substance was in a usable amount." (Italics added.)

As the court indicated it would during the jury instruction conference, the court read CALCRIM No. 251 out of numerical order so that it would immediately precede CALCRIM No. 2300.

The trial court also instructed the jury regarding Correa's necessity defense. (See CALCRIM No. 3403 ["Necessity"].)<sup>4</sup>

During closing argument, the prosecution asserted Correa "is essentially admitting to all of [the] elements" of the charged offense and is "just trying to claim that he had no choice" but to commit the offense. The prosecutor nevertheless addressed each of the elements. As to the first element, he argued:

"Number one, I have to prove to you beyond a reasonable doubt that the defendant transported for sale a controlled substance. Did he do

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<sup>4</sup> The court instructed the jury that Correa had the burden of proving the following elements by a preponderance of the evidence: "1. He acted in an emergency to prevent a significant bodily harm or evil to himself or someone else; [¶] 2. He had no adequate legal alternative; [¶] 3. [His] acts did not create a greater danger than the one avoided; [¶] 4. When the defendant acted, he actually believed that the act was necessary to prevent the threatened harm or evil; [¶] 5. A reasonable person would also have believed that the act was necessary under the circumstances; [¶] AND [¶] 6. The defendant did not substantially contribute to the emergency."

this? All you have to ask yourself is was the car moving? Yes, it was. Yes, he transported.

"I've put in red the words 'knew' in elements two and three because those are the only elements that have a knowledge requirement, the defendant had to know. *He did not have to know that the substance was transported for purposes of sale. It just has to be for purposes of sale*, and the expert witness told you under no uncertain terms, at 20 kilos, of course this is for sale.

"Was the car moving? Yes.

"Was this for sale? Yes.

"Element met." (Italics added.)

Defense counsel focused his closing argument on the necessity defense, without addressing the elements of the charged offense.

## B. *Relevant Legal Principles*

### 1. *Standard of Review*

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In determining whether instructional error has occurred, we consider the instructions as a whole and assume jurors are intelligent persons, capable of understanding and correlating all given instructions. (*Ibid.*) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*Ibid.*)



An instruction that omits an element of an offense from consideration by the jury is subject to harmless error review under the *Chapman*<sup>5</sup> "beyond a reasonable doubt" standard of prejudice. (*People v. Sakarias* (2000) 22 Cal.4th 596, 625.)

## 2. Background Regarding Section 11352 and CALCRIM No. 2300

Section 11352, subdivision (a) provides that any person who "transports" specified controlled substances shall be punished by imprisonment. (§ 11352, subd. (a).) "The courts had interpreted the word 'transports' to include transporting controlled substances for personal use." (*People v. Eagle* (2016) 246 Cal.App.4th 275, 278; see *People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1321 (*Rodas*).)

Effective January 1, 2014, the Legislature amended section 11352 by adding subdivision (c), which provides, "For purposes of this section, 'transports' means to transport *for sale*." (Stats. 2013, ch. 504, § 1, italics added; see *Rodas, supra*, 10 Cal.App.5th at p. 1321.) "The amendment intended to criminalize the transportation of drugs for the purpose of sale and not the transportation of drugs for personal use." (*Rodas*, at p. 1321.) "As a matter of law, the specific intent requirement for the offense of . . . transportation for sale . . . requires that the defendant have acted with the intention that the controlled substance at issue be sold, either by the defendant personally or by someone else." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1015 (*Lua*); see *People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1732, fn. 4 (*Consuegra*); *People v. Parra* (1999) 70 Cal.App.4th 222, 227 (*Parra*).)

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<sup>5</sup> *Chapman v. California* (1967) 386 U.S. 18, 24.

Following this amendment of section 11352, CALCRIM No. 2300 was amended "by inserting the words 'for sale' after the word 'transported.' " (*Lua, supra*, 10 Cal.App.5th at p. 1012.) Thus, the first element now reads: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant . . . transported for sale . . . a controlled substance . . . ." (CALCRIM No. 2300.)

### C. Analysis

Considering the jury instructions as a whole, we find no instructional error. As Correa acknowledges, our colleagues in the Second Division of the Fourth District recently found no error when addressing a substantially similar issue in *Lua, supra*, 10 Cal.App.5th 1005.<sup>6</sup> In that case, police found methamphetamine in the defendant's car after stopping him for a traffic violation. (*Id.* at pp. 1007-1008.) The defendant was charged with transportation for sale in violation of section 11379, and possession for sale in violation of section 11378. (*Id.* at p. 1007.) The trial court instructed the jury with CALCRIM No. 2300 (as it was revised following the 2014 amendment to § 11379), which stated the jury was required to find that the defendant "transported for sale" a controlled substance; it did not specifically define "for sale" or otherwise indicate the jury was required to find that the defendant harbored a specific intent that the controlled

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<sup>6</sup> The *Lua* court addressed the specific intent requirement in the context of transportation for sale under section 11379. (*Lua, supra*, 10 Cal.App.5th at p. 1014.) However, the court's analysis is equally applicable to the offense under section 11352 because the statutes are analogous (except for the controlled substances they address and the punishments they impose) and the Legislature simultaneously added the same definition of "transports" to both statutes via the same bill. (Stats. 2013, ch. 504, §§ 1, 2, pp. 4287-4288.)

substance be sold. (*Ibid.*) The Court of Appeal nevertheless concluded the jury instructions adequately conveyed these concepts:

"We are not persuaded that the jury's instructions, taken as a whole, constituted an incorrect statement of the law regarding the specific intent element of the offense of transporting a controlled substance for sale. The jury was instructed using CALCRIM No. 251 that both charged offenses were specific intent crimes, requiring 'proof of the union, or joint operation, of act and wrongful intent'; it was also instructed using CALCRIM No. 2300 that to convict defendant on count 1, it would have to find that he 'transported for sale' a controlled substance. Correlating these two instructions, using a plain commonsense reading, the jury was adequately instructed that the prosecution was required to prove not only that defendant intended to transport methamphetamine, but that he intended to transport it 'for sale,' as required for a conviction under the current version of section 11379." (*Lua*, *supra*, 10 Cal.App.5th at p. 1014.)

We find the reasoning in *Lua* persuasive. Indeed, it is more compelling here because the specific intent instruction (CALCRIM No. 251) could only have applied to the single count with which Correa was charged (whereas the *Lua* defendant was charged with two crimes). (*Lua*, *supra*, 10 Cal.App.5th at p. 1007.)

Correa argues *Lua* "was wrongly decided for the reasons hinted at in the opinion"; namely, the court's observation that "it is at best questionable whether, standing alone, [CALCRIM No. 2300] adequately explains the specific intent element of the offense." (*Lua*, *supra*, 10 Cal.App.5th at p. 1016.)<sup>7</sup> We disagree. Correa's jury—like the *Lua*

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<sup>7</sup> The *Lua* court encouraged the Judicial Council to amend CALCRIM No. 2300 to expressly include a specific intent component in the transportation-for-sale element. (*Lua*, *supra*, 10 Cal.App.5th at p. 1016.) In the meantime, the court encouraged trial courts to modify CALCRIM No. 2300 accordingly. (*Ibid.*) We agree this would be a sound practice.

jury—was not instructed with CALCRIM No. 2300, "standing alone." Rather, the trial court read this instruction in conjunction with CALCRIM No. 251 regarding specific intent, which the trial court specifically read out of numerical order so that it would immediately precede CALCRIM No. 2300.

Correa next argues *Lua* is distinguishable because the prosecutor and defense counsel there both focused their closing arguments on the specific intent component of the transportation-for-sale element, whereas the prosecutor's argument here may have confused the jury regarding the existence and nature of a specific intent requirement. We are not persuaded this distinction is material. First, because we find no instructional error, we need not consider the prosecutor's inartful comments. (Cf. *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220 ["'any theoretical possibility of confusion [may be] diminished by the parties' closing arguments'"].) Second, the *Lua* court's observations regarding the closing arguments were not essential to its conclusion there was no instructional error. (*Lua, supra*, 10 Cal.App.5th at p. 1014 ["Even assuming for purposes of argument that the instructions were open to interpretations that would be erroneous, the parties' closing arguments, particularly the prosecution's, diminished any possibility of confusion."].) Finally, the prosecutor framed his argument in the context of Correa essentially conceding the elements of the offense and instead focusing on a necessity defense.

Correa argues in the alternative that "even if the instruction properly required the jury to find an intent to sell, the text was so vague the jury could have convicted [Correa] as long as *someone* had an intent to sell the cocaine, even if [Correa] himself had no

intent to sell." We disagree. CALCRIM No. 251 instructed the jury they had to determine *Correa's* intent, not *someone else's*. Moreover, the jury could properly convict Correa as long as it found he intended that someone else ultimately sell the cocaine. (See *Lua, supra*, 10 Cal.App.5th at p. 1015 [defendant must act "with the intention that the controlled substance at issue be sold, either by the defendant personally *or by someone else*"], italics added; *Consuegra, supra*, 26 Cal.App.4th at p. 1732, fn. 4; *Parra, supra*, 70 Cal.App.4th at p. 227.)

Even if the trial court erred in instructing the jury, the error was harmless beyond a reasonable doubt. Correa admitted to Deputy Rodriguez he was being paid \$2,000 to transport more than 40 pounds of cocaine valued at approximately \$500,000. Rodriguez testified that based on the quantity of cocaine, it "isn't even a close call" as to whether it was being transported for sale. Moreover, Correa admitted to Rodriguez and at trial that he had previously transported drugs from Mexico to the United States.

Correa's only defense was that he was transporting the cocaine out of necessity due to threats against him and his family. The jury reasonably rejected that defense (as did the trial court at sentencing). Correa admitted he never told his wife about the supposed threats. Nor did he tell law enforcement—either in Mexico or in the United States—in the weeks before his arrest. Nor did he tell Deputy Rodriguez during the arrest. Indeed, Correa admitted his trial testimony was the first time he told *anyone* (other than his defense counsel) about the alleged threats. The fact that Correa offered to lead Rodriguez—a uniformed deputy in a marked patrol car—to the delivery location undermines Correa's claim he was too scared to tell Rodriguez about the threats.

On this record, any theoretical instructional error was harmless beyond a reasonable doubt.

## II. *Substantial Evidence*

Correa contends there was insufficient evidence to support the jury's finding that he intended to sell the cocaine or intended that someone else sell it. We disagree.

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

"Intent to sell may be established by circumstantial evidence." (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) The trial court instructed the jury regarding direct and circumstantial evidence, including that both "are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state . . . ." (See CALCRIM No. 223.)

The evidence supporting our finding that any instructional error was harmless likewise constitutes substantial evidence that Correa transported the cocaine with the intent to sell it.

### III. *No Pitchess Error*

Before trial, Correa moved under *Pitchess*, *supra*, 11 Cal.3d 531 to obtain from Deputy Rodriguez's personnel records any evidence or complaints regarding evidence tampering, falsification, or dishonesty. The trial court (Judge Dahlquist) conducted an in camera inspection of Rodriguez's complete personnel file and found no discoverable material. Correa requests that we review the sealed in camera materials to determine whether the trial court properly exercised its discretion in concluding there were no discoverable materials. The Attorney General does not oppose this request.

We have independently reviewed the sealed *Pitchess* proceedings and find the trial court did not abuse its discretion in concluding there are no discoverable materials in Deputy Rodriguez's file.

### DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.